IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. [redacted]21

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW-CIO), An Unincorporated Labor Organization, and MICHAEL VOLK, An Individual,
Petitioners,
vs.
PAUL S. RUSSELL,
Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR PETITIONERS

HAROLD A. CRANEFIELD, General Counsel,
KURT L. HANSLOWE, Asst. General Counsel,
International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, ALF-CIO,
8000 East Jefferson Avenue,
Detroit 14, Michigan,
Counsel for Petitioners.

THOMAS S. ADAIR,
J. R. GOLDTHWAITE, JR.,
1431 Candler Building,
Atlanta 3, Georgia;
SHERMAN B. POWELL,
Second Avenue and Grant Street,
Decatur, Alabama,
Of Counsel.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Supreme Court of Alabama (R. 647)[1] is reported at 264 Ala. 456, in the official reports and at 88 So. 2d 175 in the unofficial reports. An earlier opinion of the Supreme Court of Alabama in the instant case in an appeal taken by the Respondent (R. 669) is reported at 253 Ala. 615, 64 So. 2d 384.

[1] References to the printed record in this Court are designated by "R".

JURISDICTION

The opinion and judgment (R. 663) of the Supreme Court of Alabama were entered on March 22, 1956 and timely motion for rehearing was denied by that Court by entry dated June 21, 1956 (R. 668).

The petition for a Writ of Certiorari was filed on September 15, 1956, and was granted November 19, 1956. The jurisdiction of this Court rests on 28 U. S. C. ¶1257 (3), [since rights, privileges and immunities are specially set up and claimed under the Constitution and statutes of the United States and are believed to have been unproperly denied by the highest court of the State of Alabama].

QUESTIONS PRESENTED

I.

Whether the State of Alabama through the device of a common law tort action filed by an *employee* and the imposition of severe punitive damages, has assumed control of and imposed its regulations upon, the right to engage in concerted activities and the right to refrain from such activities guaranteed by Section 7 of the National Labor Relations Act, as amended, in derogation of the holding of this Court in *Amalgamated Association of Street, etc., Employees v. Wisconsin Employment Relations Board*, 340 U. S. 383, 390, note 12, and in other decisions, that the National Labor Reltaions Board was given exclusive jurisdiction to enforce such rights of *employees* and that the Federal Act had occupied this field to the exclusion of state regulation.

II.

Whether the court of the State of Alabama has jurisdiction to grant redress in damages, including punitive damages, to an *employee* of an industry affecting interstate commerce for alleged interference with his right to work during a lawful strike when such right is guaranteed and protected by Section 7 of the National Labor Relations Act, as amended, and when Congress in Sections 8 (b) (1) and 10 of that Act "prescribed procedure for dealing with the consequences of (such) tortious conduct already committed."[2]

III.

Where the State Court by its charges submitted to the jury the question of whether an alleged loss of wages was proximately caused to plaintiff by excessive picketing or by a lawful privileged and Federally protected strike, and where the evidence overwhelmingly supports the contention of the Petitioners that such loss of wages was the proximate result of the strike and was, therefore *damnum absque injuria*, under Federal law, does not the State of Alabama thereby submit to a jury for decision questions which are within the sole and exclusive province of the National Labor Relations Board to decide, and were not the Petitioners thereby deprived of valuable Federally guaranteed rights?

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[2] *United Construction Workers v. Laburnum Construction Corp.*, 347 U. S. 656, 665.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED:

Constitution of the United States:

Article I, Section 8, Clauses 3 and 18 (Commerce Powers)
Article VI, Clause 2 (Federal Supremacy)

Labor Management Relations Act, 1947:

(June 23, 1947, Ch. 120, Sec. 1, *et seq.* 61 Stat. 134, *et seq.*; 29 U. S. C. 141, *et seq.*)

National Labor Relations Act, as amended by *Labor Management Relations Act,* 1947 (June 23, 1947, Ch. 120, Title I, Sec. 101; 61 Stat. 136, *et seq.;* 29 U. S. C. 151, *et seq.*):

61 Stat. 136, 29 U. S. C. 141 (b) [L. M. R. A., Sec. 1 (b)]
61 Stat. 140, 29 U. S. C. 157 [N. L. R. A., Sec. 7]
61 Stat. 140, 29 U. S. C. 158 (b) (1) and (2)]N. L. R. A., Sec. 8 (b) (1) and (2)]
61 Stat. 146, 29 U. S. C. 160 (a), (c) and (j) [N. L. R. A, Sec. 10 (a) (c) and (j)]
61 Stat. 151, 29 U. S. C. 163 [N. L. R. A. Sec. 13]
61 Stat. 156, 29 U. S. C. 185 (a) [L. M. R. A., Sec. 301 (a)]
61 Stat. 158, 29 U. S. C. 187 (b) [L. R. M. A., Sec. 303 (b)]

Texts are set out in Appendix "A", pp. 1a-6a, *infra.*

STATEMENT OF THE CASE
and Presentation of the Federal Questions

By order of the National Labor Relations Board, dated November 21, 1949 (R. 133), and by order of the Director of the Tenth Region of the National Labor Relations Board, dated May 4, 1951 (R. 135), the Union Petitioner was certified as the exclusive representative of the employees of the Calumet and Hecla Consolidated Copper Company (Wolverine Tube Division) in Decatur, Alabama, for purposes of collective bargaining. All production and maintenance employees of the Decatur plant comprised the bargaining units thus certified (R. 137, 139).

A. Preliminary Proceedings

In July, 1952 the Respondent, Paul S. Russell (R. 1) and twenty-nine other employees of Calumet and Hecla (R. 76-81) filed identical damage suits against Petitioners and other organizations and individuals, each complaint claiming $50,000.00 damages for alleged interference, for a five-week period, with the right of such persons to work during a strike at the Decatur, Alabama plant of Calumet and Hecla.[3]

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[3] These actions were solicited to be filed by the Respondent (R. 75-81). Respondent received a verdict in the sum of $10,000.00 in this case. Upon evidence virtually identical to that in this case, other verdicts have been returned in the amounts of $8,000.00 (*McLemore v. International Union and Michael Volk*, #6150 in the Circuit Court of Morgan County, Alabama, new trial granted for improper argument of plaintiff's counsel); $10,000.00 (*James W. Thompson v. International Union and Michael Volk*, #6151 in the Circuit Court of Morgan County, appeal pending in the Supreme Court of Alabama); and $18,450.00 (*N. A. Palmer v. International Union and Michael Volk*, #6152 in the Circuit Court of Morgan County, appeal pending in Supreme Court of Alabama). Of six trials, four have resulted in verdicts as shown and two have been declared mistrials because the jury were unable to agree upon a verdict.

(Continued on next page)

The defendants in the Russell action filed their Plea to the Jurisdiction based upon Federal preemption (R. 1-4). The Respondent demurred to the plea (R. 7). Upon hearing, the trial court overruled the demurrer, thereby sustaining the plea of Federal preemption. The Respondent took a judgment of non-suit and appealed to the Supreme Court of Alabama. By decision dated March 13, 1953 (*Russell v. International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO*, 258 Ala. 615, 64 So. 2d 384) the Supreme Court of Alabama reversed the decision of the trial court, holding that the National Labor Relations Board was without jurisdiction to redress an interference with the right to work during a strike by an order for the payment of money, and that the State of Alabama retained jurisdiction to entertain the Respondent's action for damages (R. 669-681).

B. Federal Preemption Denied

Upon reinstatement of the case, the trial court sustained the demurrer to the plea of Federal preemption, as directed by the Supreme Court of Alabama (R. 10-11). On the final day of the trial Respondent amended his complaint to strike all defendants except Petitioners.

(Continued from preceding page)

The only actual damage which was, or could have been, sustained by any plaintiff was the loss of five weeks wages, or an approximate maximum of $450.00. The balance of the sums included in the verdicts were awarded as punitive damages which regulate and deter concerted activities.

Further proceedings in these cases are being held in abeyance pendidg the decision of the Court in this case. In addition, numerous other similar cases involving other unions, a portion of which are set forth in Appendix "B", *infra*, are awaiting disposition of the jurisdictional question herein raised.

The Respondent's complaint for damages, as amended (R. 4, 10) was in two counts. The first count claimed damages in the sum of $50,000.00, in that the Union Petitioner was the bargaining agent for certain employees of the Respondent's employer and called a strike to begin on July 18, 1951, and in that the defendants, in order to make the strike effective, established a picket line and prevented the Respondent from entering his place of employment by means of mass picketing and threats of violence, thereby causing him to lose time from his work from July 18, 1951 to August 22, 1951.

Count Two added the allegation that the defendants had conspired together with other persons not made parties to the suit, to prevent plaintiff from entering his place of employment, and that in furtherance of the conspiracy had blocked the street by mass picketing and threats of violence, and had caused Respondent to lose time from his employment for one month.

Both counts claimed compensatory and punitive damages.

The Petitioners' Plea to the Jurisdiction (R. 1) alleged that the Calumet and Hecla oCnsolidated Copper Company, Respondent's employer, was an industry which affected interstate commerce; that the Petitioning Union was a labor organization; that during the period of time referred to in the complaint, the employees represented by the Union were engaged in a strike and maintained a picket line at the entrance to the employer's premises for the purpose of their mutual aid and protection, as was their right and privilege under the provisions of Section 7 of the National Labor Relations Act; that the complaint alleged an unfair labor practice which invades employee rights protected by Section 7 and as to which the National Labor Relations Board has exclusive remedial juris-

diction; and that state action in the premises would violate Article II, Section 8, paragraph 3 of the Constitution of the United States, in that Congress is thereby given exclusive jurisdiction to regulate interstate commerce.

The Respondent's demurrer to the Plea (R. 7) asserts that the jurisdiction of the National Labor Relations Board is not exclusive and that the State has concurrent remedial jurisdiction over the allegations of the complaint.

Upon the Petitioners' appeal from jury verdict and judgment in the amount of $10,000.00, the Supreme Court of Alabama, while holding that the Respondent's cause of action was based solely upon an alleged interference with his employment during a strike (R. 650), nevertheless held that the juridsiction of the National Labor Relations Board was not exclusive and that the trial court had jurisdiction to entertain the complaint and grant the relief prayed (R. 648-650). In reaching its decision the Supreme Court of Alabama relied upon the decision of the Supreme Court of Virginia in *United Construction Workers v. Laburnum Construction Corporation*, 194 Va. 872, 75 S. E. 2d 694 (which in turn had relied upon the earlier decision of the Supreme Court of Alabama in this case in reaching its decision), and upon the decision of this Court in the same case (347 U. S. 656).[4] The Supreme Court of Alabama entered its decision on March 22, 1956 (R. 663), and timely application for rehearing was denied on June 21, 1956 (R. 668).[5]

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[4] This reliance was clearly misplaced as this case bears absolutely no resemblance to the factual situation presented by *Laburnum*, there being no destruction of physical property or unlawful interference with the employer's business by armed invasion of outsiders present here.

[5] The following cases are believed to sustain the presentation of the Federal question. *Building Trades Council v. Kinard Construction Co.*, 346 U. S. 933; *Garner v. Teamsters Union*, 346 U. S. 485; *United Construction Workers v. Laburnum Construction Corp.*, 347 U. S. 656.

C. The Issues Adjudicated by the State Court and Jury

Petitioners plead the general issue and defended the action by contending and introducing evidence to prove that the Calumet and Hecla plant was closed by the strike, which was Federally protected activity and that, therefore, the Respondent was caused to lose no wages by the alleged excessive picketing—that is, so many employees voluntarily participated in the strike and picketing and refrained from working that the employer could not have operated the plant and made its decision not to attempt to operate prior to the time the strike began and the picket line was established; so that no work would have been available to Respondent even if he had entered his place of employment when the strike began (R. 651).[6]

The Calumet and Hecla Decatur plant is a continuous processing line operation, all of the departments of which, both maintenance and production, are highly integrated and interdependent (45, 248, 340; App. C. 13a). The plant employed slightly over five hundred hourly paid employees, of whom over four hundred voluntarily voted to strike on the day before the strike began, and at the beginning of the strike participated in picketing and drew strike benefits (R. 34, 122, 504, 507; App. C. 13a, 19a). On the day before the strike representatives of the employees advised the Company that a strike vote had been taken to enforce bargaining demands made during two months of fruitless negotiations, and inquired whether the Company needed any maintenance employees to protect the machinery and equipment of the plant during the strike. This offer was declined by the Company and the employees were advised

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[6] A complete brief of the evidence is set forth in Appendix "C". References herein are to the printed record and to Appendix C where appropriate.

that salaried employees were fully capable of taking care of any situation which might arise inside the plant during the strike (R. 286; App. C. 13a-14a). The employee representatives were also advised that hourly employees would not work during the strike (R. 287; App. C. 14a).

A. J. Babis, a company foreman, testified that he had advised employees under his supervision that they would not work during the strike as he had been advised that the plant would remain closed to hourly paid employees for the duration of the strike because of a discussion between the Company and the Union (R. 272; App. C. 20a). Several employees testified that they received similar instructions from their supervisors prior to the time the strike began (R. 332, 356, 367; App. C. 21a).

About 7:30 on the morning the strike began, before the eight o'clock shift of employees were scheduled to arrive at work; the Company stopped charging copper billets into the rotary furnace, as was the custom when the plant was preparing to close, and employees at work on the furnace were requested to remain at work past their regular quitting time and extrude the billets which were already heated (R. 340; App. C. 21a).

Respondent Russell, who was an electrician, employed by at-will contract at an hourly rate of $1.75, approached the plant on the morning the strike began and some distance from the picket line was advised by employee Webster who was directing traffic at the request of police, that the plant was closed and that he should park his car. Russell replied: "Go to hell". and drove on toward the picket line (R. 534; App. C. 16a). Russell drove up to the picket line which was established at the end of the public road where it entered plant property and where a sign stated: "End of Public Street—Private Property". Pickets stationed at this point did not allow his automobile to pass (R.

21; App. C. 16a). After sitting in his automobile at the picket line for approximately an hour Russell left and did not return to the plant to work until August 22, 1951; approximately five (5) weeks later, when the plant reopened (R. 36; App. C 15a). Neither Russell nor his automobile was harmed in any manner (R. 81; App. C. 17a). He did not contact the Company to determine whether work was available but "assumed that there was no work (R. 48; App. C. 22a). Upon leaving the picket line Russell got together with other employees and organized a "back-to-work" movement and initiated petitions addressed to the Company as follows:

> "If the Company will reopen the gates to the people, we will cross the picket line and return to work" (R. 52; App. C. 22a).

Russell advised his attorney that it would take from two hundred to two hundred and fifty employees to operate the plant and his attorney advised that at least this number would have to sign the back-to-work petition before the Company would agree to reopen the plant (R. 56; App. C. 22a). After five weeks Russell and other non-union employees were successful in procuring approximately two hundred and forty signatures to a petition which read as follows:

> "The undersigned who were employed by you at the time of the work stoppage caused by the present strike do hereby request that you reopen your plant for work and we do individually propose to resume work for you on the same terms and conditions of employment, as were in effect at the time of the work stoppage" (R. 85; App. C. 22a-23a).

On or about August 20, 1951 this petition was delivered to the Company together with a letter from Respondent's

attorney urging upon the company its legal right to reopen the plant. Immediately upon receipt of the petition the Company by letter advised all employees that the plant would reopen on August 22 and that they should return to work (R. 49; App. C. 23a). It also ran newspaper advertisements to this effect (R. 45; App. C. 23a). This was the first occasion since the strike began on July 18 on which the Company evidenced any intention to operate the plant. It sought no injunction against excessive picketing, contacted no employees concerning work, and sought to bring in no materials up until the back-to-work petition was received.

In this connection, the Respondent showed by his evidence that less than forty employees, out of the total complement in excess of five hundred, evidenced any desire to work on the morning the strike began, July 18, and only two of these, one of whom was the Respondent, made any attempt to cross the picket line. All of the others approached to within from fifty feet to two hundred feet of the picket line and proceeded no further (App. C. 18a).

On August 20, after receiving the back-to-work petition, the Company sent its "dinky" locomotive out to pull in five cars of copper ingots which had been left at the picket line by the railroad. When the engine approached the pickets moved in front of it and it was unable to proceed. When it started back into the plant, it was discovered that unidentified persons had greased the railroad track, removed the distributor cap from the engine, and cut the air hose and fan-belt on the engine (R. 251-257; App. C. 25a). This occurred at a time when neither the Petitioner Volk, nor any other representative of the Union was present in the City of Decatur, and was the only incident which can be considered an actual disturbance which occurred during the entire strike (R. 294; App. C. 25a). The Respondent Rus-

sell was not present on this occasion, which was two days before the plant reopened (R. 258; App. C. 25a).

On August 22 the plant resumed operation with State Highway Patrolmen on hand. Russell resumed his work on that day and continued to work thereafter without interruption or molestation (R. 67; App. C. 23a).

Russell strongly opposed the organization of the Union and talked against it (R. 74; App. C. 24a). On the day before the strike he stated that the Union would never get a contract (R. 527; App. C. 15a). Immediately upon returning to work he organized an Industrial Employees Club, the purpose of which was "carrying on the employer-employee function without the intervention of any union" (R. 68-69; App. C. 24a); the club distributed literature attacking unions, which had been published by the Committee for Constitutional Government (R. 88; App. C. 24a). This literature was procured by Russell from the Decatur Chamber of Commerce, of which he, an hourly paid electrician, was a member (R. 68; App. C. 24a). He also belonged to the Decatur Country Club at which he socialized with management officials of the Company (R. 72; App. C. 24a). He testified before a committee of the Alabama State Legislature in favor of the Alabama "Right to Work" Bill (R. 74; App. C. 24a). After his return to work he petitioned the National Labor Relations Board for an election to decertify the Union (R. 74; App. C. 24a). He initiated the idea of the law suits against the Union and solicited other employees to file similar damage suits, his object being to get as many people as possible to file damage suits (R. 75; App. C. 24a).

This evidence was submitted to the jury by the trial court upon charges which instructed the jury as to the Federal rights of employees to form unions, to strike and

to picket (R. 624-625). The charges instructed in substance that if the loss of work to the plaintiff was due to the strike, then the plaintiff was not entitled to recover but that if his loss of work was due to excessive picketing then he was entitled to recover compensatory and punitive damages (R. 635, 636, 639, 641).[7] In this connection Charge #9, given at the request of Respondent, which is set forth in the footnote below,[8] was contended by Petitioners to have deprived them of their Federally protected right to strike, by permitting the jury to return an award of damages solely upon a finding that excessive picketing was engaged in, without the necessity of finding that work would have been available to Respondent during the Federally protected strike engaged in by the great majority of employees.

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[7] The language of the charges which authorized the State court jury to adjudicate federally guaranteed rights is set forth in footnote 22 at p. 59, *infra*.

[8] "9. The court charges the jury that picketing is lawful when it is for the purpose of observation, or for the purpose of peaceful persuasion or for the purpose of apprising others of a dispute between employer and employees, but that picketing is unlawful if carried on with intimidation threats, coercion, force or violence. Picketing is unlawful if such a large number of pickets is utilized as to obstruct a public street and block the entrance to a plant from said street, or if the pickets used threats or abusive language towards others to such an extent as to instill fear of harm or injury in the mind of a reasonable man. The court further charges the jury that if the defendants in this case stationed or caused pickets to be stationed on a public street, as alleged in the complaint, for the purpose of preventing plaintiff and others from entering into their place of employment by means of intimidation, threats, coercion, force or violence, and if you are reasonably satisfied from the evidence that the number of pickets and their conduct as alleged in the complaint was such as to prevent the plaintiff by such unlawful means from entering his place of employment, and as a proximate consequence thereof the plaintiff was denied access to his place of employment for a long period of time you should return a verdict in favor of the plaintiff."

SUMMARY OF ARGUMENT

FEDERAL PREEMPTION

A. The Federal Regulatory Scheme.

The National Labor Relations Act, as amended by the Labor Management Act, evinces an intention of Congress to preempt the field so far as employee rights covered by Section 7 of the N. L. R. A. is concerned. *Bus Drivers v. W. E. R. B.*, 340 U. S. 383, 390, note 12; *Guss v. Utah Labor Relations Board*, 353 U. S. 1.

B. Nature of the Cause of Action.

This was a suit by an employee of an industry affecting interstate commerce seeking punitive damages for an alleged interference with his right to work during a lawful Federally protected strike by the members of a union certified by the National Labor Relations Board as bargaining agent. It was not a suit for assault and battery, property damage, or other common law tort for which damages could be allowed without regard to the background out of which the alleged tort arose or independent of an actual interference with the right of an employee to engage in his work. Neither was it a case of the exercise in an emergency of the historic powers of the state over traditionally local matters such as public safety and order, and use of streets and highways, as in *United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-CIO v. Wisconsin Employment Relations Board and Kohler Co.*, 351 U. S. 266.

C. National Labor Relations Board Has Jurisdiction of the Subject Matter.

By virtue of Section 7 of the National Labor Relatio Act, as amended, the right of employees in industri affecting interstate commerce to work during a strike guaranteed.

Sections 8 (b) (1) (A) and 10 of the Act give the N tional Labor Relations Board the power and procedu with which to redress and remedy invasions of this rig by unions. *Amalgamated Association of Street, Electr Railway, etc. Employees v. Wisconsin Employment Rel tions Board*, 340 U. S. 383, 390, note 12; *Sunset Line an Twine Co.*, 79 N. L. R. B. 1487; *Cory Corporation*, 84 N. L R. B. 972.

D. Congressional Definition of Rights Plus Provision of a Specific Remedy to Protect and Regulate These Rights Constitute a Complete Scheme of Regulation, Having All the Criteria of Federal Preemption.

When Congress, acting within its constitutional power defines rights and provides a remedy for the protectio and regulation of these rights, and invests the custod of the rights and the remedies to an administrative agency such exercise of jurisdiction is preemptive. The remed thus provided is exclusive and must be exhausted befor any resort to the courts may be had, and the remedy super sedes common law rights of action accruing to individual under the law of a state. *Switchmen's Union v. Nationa Mediation Board*, 320 U. S. 297; *Aircraft Corporation Hirsch*, 331 U. S. 752; *Cloverleaf Butter Company v. Pa terson*, 315 U. S. 148; *Western Union Telegraph Com pany v. Speight*, 254 U. S. 17.

The extent of the remedy provided represents an exercise of the judgment of Congress, and supplementary remedies provided by a state, even though not inconsistent with that provided by Congress, are ineffective as they are necessarily inconsistent with the extent of regulation Congress thought right. *Amalgamated Association, etc., Employees v. Wisconsin Employment Relations Board*, 340 U. S. 383; *Charleston and Carolina Railroad Company v. Varnville Co.*, 237 U. S. 597; *Missouri Pacific Railroad Company v. Porter*, 273 U. S. 341.

E. The Jurisdiction of the National Labor Relations Board to Regulate and Redress the Rights Protected by Section 7 is Exclusive.

Irrespective of the extent of the remedies and procedures delegated by Congress to the National Labor Relations Board, the States may not regulate in respect to rights guaranteed by Congress in Section 7 of the National Labor Relations Act. *Amalgamated Association, etc. v. Wisconsin Employment Relations Board*, 340 U. S. 383, 390, note 12; *International Union, UAW v. O'Brien*, 339 U. S. 454; *Hill v. Florida*, 325 U. S. 538; *Garner v. Teamsters Union*, 345 U. S. 485. This is true because, although it is designed to promote the public welfare, the National Labor Relations Act creates substantive private rights which are not dependent upon state law and the authority granted to the National Labor Relations Board to protect the rights of individuals is remedial and is not intended for the vindication of public wrong. *National Labor Relations Board v. Hearst Publications*, 322 U. S. 111; *Republic Steel Corporation v. N. L. R. B.*, 311 U. S. 7.

The foregoing is not in conflict with, but is consonant with, the holding of this Court in *United Construction Workers v. Laburnum Construction Corporation*, 347 U. S.

656, since in that case the plaintiff in the state court was an employer whose right to conduct his business free from violence is not protected by the Act and to whom no remedy has been provided or suggested as a substitute for traditional state Court procedure for collecting damages for injuries caused by conduct which was clearly both unprotected and unprivileged. In the instant case, however, the plaintiff is an employee whose rights are guaranteed by Section 7, and a substitute procedure to protect and redress these rights is provided by Sections 8 (b) (1) and 10.

Neither is such a holding inconsistent with the decisions of this Court which hold that such traditionally local matters as the control of violence and of the use of the public streets and highways remain in the states. In these cases the criteria was the need for protection of the public peace and order; whereas in the instant case no question of maintenance of public peace and order is involved and the subject matter solely concerns fundamental Section 7 rights—the interbalancing of the employee rights to engage in concerted activity and to refrain from such activity, which subject matter was entrusted by Congress to the National Labor Relations Board.

F. If the Extent of Relief Provided by Congress is a Relevant Consideration, It Is Apparent From the Provisions of the Act That the Power of the National Labor Relations Board to Enter Remedial and Reparation Orders is Coextensive With the Discretion Granted to It to Effectuate the Policies of the Act.

The Board has held that it cannot enter an award of back pay for wages lost as a result of interference with the right of ingress to the place of employment during a strike (*Colonial Hardwood Flooring Co., Inc.*, 84 N. L. R.

B. 563; *United Mine Workers of America and West Kentucky Coal Co.*, 92 N. L. R. B. 916). Such is a decision upon a question of law and not an exercise of administrative discretion, and is of doubtful validity.

The entire remedial power granted to the Board is defined in Section 10 of the Act and the authority contained in this Section is identical, no matter what section of the Act is violated. The construction of the Act by the Board, limiting its power in cases of alleged interference with the right to work, is difficult to reconcile with the decisions of this Court in *Phelps-Dodge Corp. v. N. L. R. B.*, 313 N. L. R. B. 177, and *Virginia Electric and Power Co. v. N. L. R. B.*, 319 N. L. R. B. 533, which hold that the authority of the Board to frame remedial orders is coextensive with the effectuation of the policies of the Act. Such decision is also inconsistent with the Congressional policy expressed in Section 1 (b) of the Labor Management Relations Act and with the legislative history of Section 10 (c) (See Appendix "D"). Furthermore, such decision by the Board is inconsistent with other Board decisions involving violations of Section 8 (b) (1) of the Act in which it has held that it does have authority to enter a remedial order requiring the payment of money in such cases. E. g., *Eclipse Lumber Company, Inc.*, 95 N. L. R. B. 464.

Under Section 10 (c) of the Act the Board has authority to require a person * * * "to take such affirmative action * * * as will effectuate the policies of this Act;" and this power is not limited by the illustrative phrases "including reinstatement of employees with or without back pay" and "provided that back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him." *Phelps-Dodge Corp. v. N. L. R. B.* and *Virginia Electric and Power Co. v. N. L. R. B., supra.* The latter proviso does

not limit the authority of the Board, but provides onl that a union may *alone* be held responsible when it act through an employer to commit an unfair labor practic involving discrimination.

G. The Protection of the Right to Strike and the Interbalancing of This Right With the Right of Employees to Work in the Face of a Strike Cannot Be Accomplished by a Multiplicity of Procedures and Tribunals.

It was the aim of Congress to entrust the matter o the interbalancing of the right to strike and the right o employees to work in the face of a strike to the Nationa Labor Relations Board where they could be regulate by a single harmonious pattern of rules administered b an expert agency under uniform procedure. *Guss v. Uta Labor Relations Board*, 353 U. S. 1. In so doing Congres intended to dispel the confusion which would result fro a dispersion of authority and from a multiplicity of regu lations. *Garner v. Teamsters Union*, 346 U. S. 485; *Amal gamated Utility Workers v. Consolidated Edison Co.*, 30 U. S. 261.

The right of employees to organize and to strike is fundamental right guaranteed to employees by Section of the National Labor Relations Act. *N. L. R. B. v. Jone & Laughlin Steel Corp.*, 301 U. S. 1; *Amalgamated Associa tion of Street, etc. Employees v. Wisconsin Employmen Relations Board*, 304 U. S. 383. Existence of a guarantee right to engage in lawful concerted activity carries wit it the necessary guarantee that such right may be exer cised free of liability in damages for loss occasioned there by to others. *Restatement of Torts*, Sec. 809. The tria judge in the instant case recognized the privileged na ture of a lawful strike and that no damages could b awarded which were the proximate result of the strike a

distinguished from picketing. In so recognizing the right to strike, the trial judge charged the jury upon the federal rights of Petitioners accruing under the National Labor Relations Act, and thereby placed into the hands of a state court jury the interpretation and protection of Federal rights which had been entrusted by Congress to the National Labor Relations Board.

The jury returned a verdict which included in excess of $9,500.00 in punitive damages which are damages of a regulatory nature for the purpose of deterring the wrongdoer and others from similar acts. As such, punitive damages in their nature are policy measures which invade national policy entrusted exclusively to the National Labor Relations Board, and not mere police measures which control the public peace and order. This was done upon evidence which did not authorize the imposition of punishment upon the exercise of the Federal right to strike and to picket, and where the National Labor Relations Board undoubtedly would not have held that these Federal rights had been exceeded or waived. *N. L. R. B. v. Elkland Leather Co.*, 114 F. 2d 221 (C. A. 3, 1940); *N. L. R. B. v. Remington-Rand*, 94 F. 2d 862 (C. A. 2, 1938); *Milkwagon Drivers v. Meadowmoor Dairies, Inc.*, 312 U. S. 287.

If there is to be federally protected right to strike, such right cannot exist where it is to be subjected to punitive regulations by the opinions and prejudices of jurors in the thousands of state trial courts throughout the nation with power to override national policy as to the extent of permissible activity protected by Section 7.

This is not to say here that mass picketing, threatening of employees, obstructing streets and highways, and picketing of homes, are matters which the state may not prohibit in the exercise of its police powers in an emergency.

Picketing, under the regulations heretofore established by this Court, can be controlled without reaching into the field of interbalancing the rights of employees protected by Section 7; however, no such application for emergency relief was sought in the present case.

The problem of filtering from the facts the answer to questions of such complexity, that is whether or not the bounds of activity protected and privileged by federal policy have been exceeded, and if so, whether financial loss to employees has resulted, can best be left to the skill and professional discernment of the National Labor Relations Board. Such matters "require a special training to enable anyone even to form an intelligent opinion about them." *Vegelahn v. Guntner*, 167 Mass. 92, 105-6, Holmes, J., dissenting.

ARGUMENT

A. THE FEDERAL REGULATORY SCHEME

In Section 1 of the National Labor Relations Act (July 5, 1935, c. 372; 49 Stat. 449; 29 U. S. C. §151) Congress stated in its findings and policies that the denial by employers of the right of employees to organize and the refusal of employers to accept the procedures of collective bargaining lead to strikes and industrial strife and unrest which burden and obstruct commerce. It further found as follows:

> "Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encourag-

ing practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

To implement this declaration of policy Congress enacted Section 7 (29 U. S. C. 157) which stated that employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

It also provided Section 8 (29 U. S. C. 158), which stated: "It shall be an unfair labor practice for an *employer* * * *" to interfere with Section 7 guarantees.

The National Labor Relations Act, therefore, undertook to define only affirmative employee rights and protected the limited guarantees against invasion by employers only. It made no attempt to define negative employee rights or to regulate activity or conduct of unions in any respect whatsoever.

In enacting the Labor Management Relations Act, 1947, Congress amended Section 1 of the National Labor Relations Act by adding the following paragraph:

> "Experience has further demonstrated that certain practices by some *labor organizations,* their officers and members, have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest, or through concerted activities which impair the interest of the public in the free flow of such commerce. Elimination of such practices is a necessary condition to the assurance of the rights herein *guaranteed*" (29 U. S. C. 151).

It also provided that it was the purpose and policy of the Labor Management Relations Act, 1947, "in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, *to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce,* to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare and to protect the rights of the public in connection with labor disputes affecting commerce." [29 U. S. C. 141 (b); italics added.]

To effectuate this broadened expression of policy and purpose, Section 7 was amended so as to provide that employees shall have the right to refrain from any or all of the activities which were protected to them by the National Labor Relations Act, thus protecting, for instance, the right of an employee to work while other employees

engaged in a strike. And, Congress, also, by amending Section 8 to add Section 8 (b) provided for unfair labor practices on the part of labor organizations and their agents, among which was the restraint or coercion of the employees in the exercise of rights guaranteed in Section 7, that is, the right to refrain from engaging in concerted conduct (29 U. S. C. 158 (b) (1) (A)).

In addition, Congress in Sections 8 (b) (1) (B), 8 (b) (3), 8 (b) (4) and 8 (b) (6) enacted provisions which were designed to protect employers from certain defined improper practices of unions. By 8 (b) (1) (B) an employer was to be free in the selection of his collective bargaining representatives; by 8 (b) 3 (3) an employer was protected from a refusal to bargain on the part of the union, and by 8 (b) (4) the employer was protected from certain other condemned practices. Section 8 (b) (6) protected an employer against the collection of money for services not performed (29 U. S. C. 158).

Thus, the amended Act, while carrying forward the original scope of the National Labor Relations Act and defining and remedying employer unfair practices, declared certain illegal practices on the part of unions, among which were interference with the rights of employees to refrain from concerted activities and to work, and certain rights of employers. The right of the employer to carry on his business free from restraint and coercion by violence or threats of violence was *not* one of the unfair labor practices defined in the amended Act.

While the original National Labor Relations Act provided for no court remedies other than for the enforcement of Labor Board orders, the Labor-Management Relations Act amendments provided for suits by and against labor organizations for violation of contracts (29 U. S. C.

185) and for suits against labor organizations in the case of violations of Section 8 (b) (4) (29 U. S. C. 187). It also provided for the creation of the Federal Mediation and Conciliation Service, for alleviating national emergencies caused by labor disputes, for restrictions upon certain payments to labor organizations, and for restrictions upon political contributions by unions.

The National Labor Relations Act as amended by the Labor Management Relations Act, together with the other new provisions of the Labor Management Relations Act, thus outlined a virtually complete code of labor regulations and left unregulated and to the states very little of the field which had not been covered by the National Labor Relations Act prior to its amendment.

The field which was left to the states has been narrowly defined by the Court in the following decisions:

Allen Bradley Local v. Wisconsin Board, 315 U. S. 740;
Garner v. Teamsters Union, 346 U. S. 485;
Weber v. Anheuser-Busch, Inc., 348 U. S. 468;
United Automobile Workers v. Kohler Co., 351 U. S. 266;
United Construction Workers v. Laburnum Construction Corp., 347 U. S. 656.

The areas left to the states by these decisions parallel to a great degree the same field of activity which was left to the regulation of the Federal courts by the Norris-LaGuardia Act. After the enactment of the Norris-LaGuardia Act the Federal court could still issue an injunction, the purpose of which was the emergency protection of property and the maintenance of law and order. The Norris-LaGuardia Act is thus an express declaration that,

as has been recognized by the Court in its decisions involving the exercise of the police power of the states, the maintenance of law and order and of the public peace and tranquility remain a police function, which is to be narrowly exercised by the courts in a proper case.

These three Acts construed together, indicate an intention upon the part of Congress to establish a full and complete policy concerning labor activity in interstate commerce, together with the provisions it thought necessary to implement these policies. These policies include the recognition and the guarantee of, and the establishment of machinery for the protection of, the right of employees to engage in collective bargaining and other concerted conduct, as well as the right to abstain from such conduct.

The establishment of this machinery does not envisage the necessity for the state or for the Federal Courts, under the guise of the police power, to intrude into the sphere of interbalancing the rights which are regulated by Congress for the purpose of removing obstructions to interstate commerce.

B. SUBJECT MATTER OF THE ACTION—ALLEGED INTERFERENCE WITH EMPLOYEE'S RIGHT TO WORK DURING A LAWFUL STRIKE.

This is not a case of the exercise by the State of Alabama of its "historic powers over such traditionally local matters as public safety and order and the use of streets and highways." (*Allen-Bradley Local v. Wisconsin Board*, 315 U. S. 740, 749; *Garner v. Teamsters Union*, 346 U. S. 485, 488). Neither was it a suit for assault and battery, property damage or other common law tort for which damages could be allowed without regard to the background out of which the alleged tort arose, or independ-

ent of an actual interference with the right of an employee to engage in his employment.[9]

This was a suit to recover damages for an alleged interference with an hourly employee's right to work by the claimed means of excessive picketing during a lawful strike conducted by a union which was the "bargaining agent" of the employees.[10] These matters are alleged in the complaint, which was filed almost a year after the events in question, and were held by the Supreme Court of Alabama to state a cause of action "preventing plaintiff from engaging in his employment" (R. 650).

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[9] It has long been the established law of Alabama, in accord with the general rule, that an individual cannot recover damages for the alleged obstruction, by any means whatever, of a public street, unless he can show special damages accruing to him personally which differ, not in degree, but in *kind*, from those which may result to the public generally. *Walls v. C. D. Smith & Co.*, 167 Ala. 138, 52 So. 320; *Ex parte Ashworth*, 204 Ala. 391, 86 So. 84; *Birmingham Ry., Light and Power Co. v. Smyer*, 181 Ala. 121, 61 So. 354; *Cassimus v. Levystein*, 176 Ala. 365, 58 So. 280; *Day v. Ala. West. RR. Co.*, 175 Ala. 162, 57 So. 724; *Weiss v. Taylor*, 144 Ala. 440, 39 So. 519; *Russell v. Holderness*, 216 Ala. 95, 112 So. 309; *Horton v. Southern Ry. Co.*, 173 Ala. 231, 55 So. 531; *First Avenue Coal, etc. Co. v. Johnson*, 171 Ala. 470, 54 So. 598. Where, as here, the alleged obstruction was at the *end* of the public street where it entered the private property of the employer, the plaintiff, to recover wages claimed to have been lost, had the burden of proving his special damages by proving that work would have been available to him—an employee hired and paid by the hour, whose contract of employment was terminable at will—had he entered his employer's premises. Prosser, *Torts*, Sec. 106 (2nd Ed., 1955).

[10] The strike, voted by the employees to enforce their bargaining demands, was admittedly legal, Federally protected activity in an industry affecting interstate commerce.

C. NATIONAL LABOR RELATIONS BOARD HAS JURISDICTION OVER THE SUBJECT MATTER OF THE ACTION:

Section 7 of the National Labor Relations Act, as amended, guarantees and protects the right of employees to form and join unions and to engage in other concerted activities and, likewise, guarantees and protects the right of employees to refrain from concerted activities. Section 8 (b) (1) (A) proscribes the interference with these rights by a labor organization or its agents; and Section 10 invests the National Labor Relations Board with jurisdiction, power and procedures with which to deal with invasions of these rights.[11]

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[11] "Sec. 7. Employees have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)." (29 U. S. C. 157.)

"Sec. 8 (b). It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of rights guaranteed in section 7 * * *." (29 U. S. C. 158 (b) (1).)

"Sec. 10 (a). The Board is empowered, as hereinafter provided to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting Commerce * * *.

"(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such persons to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without pay, as will effectuate the policies of this Act: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him:

(Continued on next page)

Applying these sections, the Board has repeatedly hel
that it is a violation of Section 8 (b) (1) (A) of the A
for a labor organization or its agents to interfere by mas
picketing, violence or threats of violence, with the rig
of an employee to work during a strike and that it ha
juridiction over invasions of this right.[12]

(Continued from preceding page)

* * *

"(j) The Board shall have power, upon issuance of a complaint
provided in subsection (b) charging that any person has engaged in
is engaging in an unfair labor practice, to petition any district court
the United States (including the District Court of the United States f
the District of Columbia), within any district wherein the unfair lab
practice in question is alleged to have occurred or wherein such pers
resides or transacts business, for appropriate temporary relief or r
straining order. Upon the filing of any such petition the court sha
cause notice thereof to be served upon such person, and thereupon sha
have jurisdiction to grant to the Board such temporary relief or restrai
ing order as it deems just and proper."

(29 U. S. C. 160 (a) (e) and (j).)

[12] E. g. *Sunset Line and Twine Co.*, 79 N. L. R. B. 1487, 1504, whe
the Board said:

"Under this Section one of the new statutory provisions in whi
union unfair labor practices are defined and proscribed, the essenti
elements of a violation are three-fold. There must be (1) restrai
or coercion, (2)) practiced by a labor organization or its agents, (
against employees in the exercise of rights guaranteed in Section
of the Act.

"In this case the trial examiner accepted the general counse
premises that the third element is present, namely, the protect
right of employees to 'refrain' from striking, that is, to work in t
face of the strike.

"We agree that employees enjoy that protected right under t
Act, as amended, and that there was interference with its exercise
this case."

Accord: *Smith Cabinet Mfg. Co.*, 81 N. L. R. B. 886; *In re Co
Corporation*, 84 N. L. R. B. 972; *B. H. Swaney, Inc.*, 95 N. L. R. B. 54
Fairmont Construction Co., 95 N. L. R. B. 969; *W. T. Smith Lumber C*
116 N. L. R. B. No. 64.

This construction of Section 8 (b) (1) accords with expressions of legislative intent at the time the provision was being considered by Congress,[13] and with the holding of this Court in footnote 12 to the opinion in *Amalgamated Association of Street, Electric Railway, etc., Employees v. Wisconsin Employment Relations Board*, 340 U. S. 383, 390, where the Court held:

> "Section 7 of the Labor Management Relations Act not only guarantees the right of self organization and the right to strike, but also guarantees to individual employees the 'right to refrain from any or all of such activities' at least in the absence of a union shop or similar contractual arrangement applicable to the individual. Since the N. L. R. B. was given jurisdiction to enforce the rights of the employees, it was clear that the Federal Act had occupied this field to the exclusion of state regulation. Plankinton and O'Brien both show that states may not regulate in respect to rights guaranteed by Congress in §7."

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[13] Senator Taft said:

"I think when we get to the case of unions there might be the actual act of forcibly, by mass picketing, preventing a man from working.

"Let us take the case of mass picketing which absolutely prevents all the office force from going into the office of the plant. That would be a restraint and coercion against those employes, and interference with their right to work. * * * The effect of the pending amendment is that the Board may call the union before them, exactly as it has called the employer, and say, 'Here are the rules of the game. You must cease and desists from coercing and restraining the employees who want to work from going to work and earning the money which they are entitled to earn.' The Board may say, 'You can persuade them; you can put up signs; you can conduct any form of propaganda you want to in order to persuade them, but you cannot, by threat or force, or threat of economic reprisal, prevent them from exercising their right to work.' As I see it that is the effect of the amendment." 93 *Congressional Record* 4562.

D. CONGRESSIONAL GUARANTEE OF RIGHTS PLUS PROVISION OF A SPECIFIC REMEDY TO PROTECT AND REGULATE THESE RIGHTS CONSTITUTE A COMPLETE SCHEME OF REGULATION HAVING ALL THE CRITERIA OF FEDERAL PREEMPTION, AND THE NATURE OR EXTENT OF THE RELIEF PROVIDED BY CONGRESS IS IMMATERIAL. THE JURISDICTION OF THE N. L. R. B. TO PROTECT RIGHTS GUARANTEED TO EMPLOYEES BY SECTION 7 IS THEREFORE EXCLUSIVE.

The quotation from the *Bus Drivers'* case, *supra*, reiterates the construction which this Court has historically placed upon Article I, Sec. 8, and Article VI, Clause 2 of the Constitution of the United States. The Court has always held that the power of Congress over interstate commerce and matters which affect or burden commerce is plenary and is as broad as the police powers of the states. *National Labor Relations Board v. Jones and Laughlin Steel Corp.*, 301 U. S. 1; *Gibbons v. Ogden*, 9 Wheat. 195:

> "The two laws may not be in such absolute opposition to each other, as to render the one incapable of execution, without violating the injunctions of the other; and yet, the will of one legislature may be in direct collision with that of the other. This will is to be discovered, as well by what the legislature has not declared, as by what they have expressed. Congress, for example, has declared, that the punishment for disobedience of the act of Congress, shall be a certain fine; if that provided by the State legislature for the same offense be a similar fine, with the addition of imprisonment or death, the latter law would not prevent the former from being carried into execution, and may be said, therefore, not to be repugnant to it. But surely the will of Congress is, nevertheless, thwarted and opposed.
>
> "* * *

"* * * Congress has exercised the powers conferred on that body by the Constitution, as fully as was thought right, and has thus excluded the power of legislation by the States on these subjects, except so far as it has been permitted by Congress; although it should be conceded, that important provisions have been omitted, or that others which have been made might have been more extended, or more wisely devised."

Houston v. Moore, 5 Wheat. 1, 21-23, Justice Washington speaking for the Court.

When Congress undertakes to legislate on a subject, it must be presumed that the Congressional regulations go as far as Congress "thought right"; and State regulation or action which goes further than the Congressional regulation (by imposing staggering punitive damages, for example), even though it be not incompatible with the Congressional regulation in its intent and purpose, is nevertheless necessarily inconsistent with and contradictory of the judgment of Congress as to how far the regulation should go. *Amalgamated Association of Street, etc. Employees v. Wisconsin Employment Relations Board*, 340 U. S. 383.[14]

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[14] "When Congress has taken the particular subject matter in hand, coincidence is as ineffective as opposition and a State law is not to be declared a help because it attempts to go further than Congress has seen fit to go." *Charleston and Carolina Railroad v. Varnville Co.*, 237 U. S. 597, 604.

"Congress must be deemed to have determined that the rule laid down and the means provided by the Cormack and Cummins amendments to the Interstate Commerce Act to enforce it are sufficient and that no other regulation is necessary. Its power to regulate such commerce * * * is supreme; and as that power has been exerted, state laws have no application. They cannot be applied in coincidence with, as complementary to, or as in opposition to, Federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction." *Missouri Pacific Railroad Co. v. Porter*, 273 U. S. 341, 345.

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This Court has also in many and varied instances and applications held that rights of action accruing to individuals under the common law of a state are superseded by acts of Congress regulating interstate commerce. E. g., *Western Union Telegraph Co. v. Speight*, 254 U. S. 17; *Texas and Pacific Railway Company v. Abilene Cotton Oil Company*, 204 U. S. 426:

> "* * * It is for Congress to determine how the rights which it creates shall be enforced * * *. In such a case the specification of one remedy normally excludes another."
>
> *Switchmen's Union v. National Mediation Board*, 320 U. S. 297, 301.

Where Congress has, as here, provided an administrative remedy, such remedy is exclusive and must be exhausted before any resort to the courts, state or federal, may be had. *Aircraft Corporation v. Hirsch*, 331 U. S. 752, 767, 768, and cases cited.

In accordance with the foregoing principles, the Court has repeatedly and consistently held that the jurisdiction of the National Labor Relations Board to regulate and interbalance the rights of employees protected by Section 7 of the National Labor Relations Act, as amended, is exclusive, and is not to be aided by concurrent efforts of states to afford additional protection.

In *International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO v. O'Brien*, 339 U. S. 454, 456, this Court said:

(Continued from preceding page)

"* * * where the United States exercises its power of legislation so as to conflict with a regulation of the State, either specifically or by implication, the State legislation becomes inoperative and the Federal legislation is exclusive in its application." *Cloverleaf Butter Company v. Patterson*, 315 U. S. 148, 156.

> "Congress has not been silent on the subject of strikes in interstate commerce. In the National Labor Relations Act of 1935, 49 Stat. 449, 29 U. S. C., Sec. 151, as amended by the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U. S. C. (Supp. III) Sec. 141, Congress safeguarded the exercise of employees of 'concerted activities' and expressly recognized the right to strike. It qualified and regulated that right in the 1947 Act."

In that case this Court invalidated the application of the Michigan strike vote law to strikes in industries affecting interstate commerce.

In *Hill v. Florida*, 325 U. S. 538, the Court invalidated the Florida law requiring a license for labor representatives because the law limited the freedom of choice of bargaining representatives by employees and impinged upon the collective bargaining process protected by the National Labor Relations Act.

In *Bethlehem Steel Company v. New York State Labor Board*, 330 U. S. 887, and in *Plankinton Packing Company v. Wisconsin Employment Relations Board*, 338 U. S. 953, the Court protected the jurisdictional integrity of the National Labor Relations Board as to unit certifications and as to remedies for unfair labor practices against inroads by state agencies.

Concerning these decisions, in footnote 12 to the *Bus Drivers'* case, *supra*, the Court explained they held that the States may not regulate in respect to rights guaranteed by Congress in Section 7 of the Act.

In *Garner v. Teamsters Union*, 346 U. S. 485, 490, the Court made it clear that the conflict of jurisdiction between federal and state procedures applied to regulation by state courts as well as to state administrative agencies, saying:

> "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures were necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies * * *. A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or an application of the federal Board, precludes state courts from doing so. Cf. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U. S. 261. And the reasons for excluding state administrative bodies from assuming control of matters expressly placed within the competence of the federal Board also exclude state courts from like action. Cf. *Bethlehem Steel Co. v. New York Board*, 330 U. S. 767."

In the same case the Court pointed out that the conflict in duplicate regulation or jurisdiction between state and federal authorities is primarily a conflict in remedies, and that where a federal remedy has been provided in the public interest, the state remedy for the protection of primarily private rights must yield, as follows:

"Further, even if we were to assume, with petitioners, that distinctly private rights were enforced by the state authorities, it does not follow that the state and federal authorities may supplement each other in cases of this type. The conflict lies in remedies, not rights. The same picketing may injure both public and private rights. But when two separate remedies are brought to bear on the same activity, a conflict is imminent" (346 U. S. 485, 498).

"* * *

"We conclude that when federal power constitutionally is exerted for the protection of public or private interest, or both, it becomes the supreme law of the land and cannot be curtailed, circumvented or extended by a state procedure merely because it will apply some doctrine of private right. To the extent that the private right may conflict with the public one, the former is superseded" (346 U. S. 485, 500).

However, the Court has held that the National Labor Relations Act, while regulating interstate commerce in the public interest, creates and protects substantive rights which are not dependent upon state law, (*National Labor Relations Board v. Hearst Publications,* 322 U. S. 111, 123); and that the authority granted to the National Labor Relations Board to protect the rights of individuals is remedial and is not intended for the vindication of public wrongs:

"The Act is essentially remedial. It does not carry a penal program declaring the described unfair labor practices to be crimes. The Act does not prescribe penalties or fines in vindication of public rights or provide indemnity against community losses as distinguished from the protection and compensation of employees * * *. All of these measures relate to the protection of the em-

ployees and the redress of their grievances, not to the redress of any supposed public injury * * *."

Republic Steel Corp., v. N. L. R. B., 311 U. S. 7, 10-11;

Cf., *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, 235.

From the foregoing decisions, the true rule of preemption obviously is that it is the creation or protection of rights and the provision by Congress of a remedy, or machinery, to enforce the rights thus created or protected, which constitute the criteria for the determination of whether the Congressional regulation is exclusive and that the source or means of interference with these rights is immaterial.[15] *Garner v. Teamster's Union*, 346 U. S. 485, 490.

Thus, the existence of actual or threatened force or violence is not determinative in the solution of the problem of jurisdiction. This case, like the *Garner* case, but unlike the *Kohler* case,[16] does *not* involve the exercise of emergency powers of the state to maintain law and order, but involves solely, to reiterate, the interbalancing of rights protected by Section 7 of the Act. This function has been committed by Congress to the National Labor Relations Board.

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[15] "It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the Congressional power. Acts having that effect are not rendered immune because they grew out of labor disputes. * * * It is the effect upon commerce, not the source of the injury, which is the criterion." *National Labor Relations Board v. Jones and Laughlin Steel Corp.*, 301 U. S. 1, 31.

[16] *United Automobile, Aircraft and Agricultural Implement Workers of America v. Wisconsin Employment Relations Board and Kohler Company*, 351 U. S. 266; 76 S. Ct. 794.

In accordance with its policy to protect *employees* in their relations with labor unions, Congress has given the Board express power to adjudicate the rights of employees to engage in concerted conduct or to refrain from such conduct and to provide such relief to employees as it may deem necessary to protect these rights entrusted by Congress to its expert custody. It follows that, Congress having taken the subject matter of employee rights in hand, and having entrusted their care to the National Labor Relations Board, the jurisdiction thus exercised and the remedies thus created are exclusive.

Irrespective of and without regard to what relief may be available to employees before the Labor Board, it must be deemed that Congress went as far as it thought proper and provided for all the relief it thought necessary and advisable to accomplish the Congressional purpose. An attempt by the State to provide additional or more complete relief than Congress thought right is as ineffective as direct opposition to the Congressional enactment, because to grant further relief to one of the parties against the other would destroy the Congressional scheme and aim of *interbalancing* employee rights as a means of removing obstructions to the flow of interstate commerce.

E. THE DOCTRINE OF EXCLUSIVENESS AS TO REGULATION OF SECTION 7 EMPLOYEE GUARANTEES DOES NOT CONFLICT WITH ANY PREVIOUS PRONOUNCEMENTS OF THIS COURT—KOHLER AND LABURNUM DISTINGUISHED.

The decisions of the Court upholding state action which actually or potentially overlaps the subject matter covered by the National Labor Relations Act and the jurisdiction of the National Labor Relations Board, have restricted permissible state action to two specific types of cases:

(1) Where the traditional police power of the state was exercised to maintain public safety and order and the use of streets and highways; and (2) Where the subject matter *in judicia* was not regulated or protected by the Federal Act, and where no parallel remedy is provided before the National Labor Relations Board.

(1) Exercise of Police Power.

The instant case was not an exercise by the state of its "historic powers over such traditionally local matters as public safety and order and the use of streets and highways." (*Allen-Bradley Local v. Wisconsin Board*, 315 U. S. 740, 749; *Garner v. Teamsters Union*, 346 U. S. 485, 488), such as that which was recently upheld in the case of *United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-CIO, v. Wisconsin Employment Relations Board and Kohler Co.*, 351 U. S. 266.

As was previously discussed (pp. 26-27, *supra*), Congress in the Norris-LaGuardia Act expressly declared that, within narrowly defined bounds, the courts are a proper instrument through which law and order may be maintained and physical property protected in an emergency. The maintenance of law and order, the protection of homes and physical property, and the prevention of obstructions to the public use of streets and highways, are all emergency functions, traditionally local in their nature. These emergency exercises of the police power, however, are far removed from an intrusion into the field of Congressional policy as to protected labor activity in interstate commerce. Such functions do not require or include the protection of the right to work or the regulation and limitation of the right to strike in an industry affecting interstate commerce by the imposition of punitive damages. Such is the regulation of Section 7 rights, a sphere in

which "Congress has expressed its judgment in favor of uniformity" and has evidenced "a general intent to preempt the field." *Guss v. Utah Labor Relations Board*, 353 U. S. 1, —; *Amalgamated Meat Cutters v. Fairlawn Meats, Inc.*, 353 U. S. 20.

(2) Where the Rights Are Unregulated and Where Congress Has Provided No Parallel Remedy.

Neither does the present case involve an instance of injurious conduct neither prohibited, regulated nor protected by the Federal Act which would be entirely ungoverned unless governable by the state, such as that which was present in *International Union, UAW-AFL v. Wisconsin Employment Relations Board*, 336 U. S. 245, 254.

Nor is it a case such as that before the Court in *United Construction Workers v. Laburnum Construction Corp.*, 347 U. S. 656, 663, where "Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct." There the complaining party, or plaintiff, in the court below was an employer whose rights are not attempted to be protected by Congress in Section 7 of the National Labor Relations Act, and whose rights when violated cannot be redressed under Section 8 (b) (1) of the National Labor Relations Act; whereas, here the Respondent is an employee whose right to refrain from striking and to work in the face of a strike are specifically protected by Section 7 of the Act, and to whom a specific remedy is granted by Section 8 (b) (1) of the Act for the violation of these rights.

The Act, as amended, neither regulates nor protects the *employer* rights adjudicated in the *Laburnum* case, nor does it supply a remedy parallel to that exercised by the

State court in that case. Section 7 of the National Labor Relations Act protects the rights of *employees*, not employers. Section 8 (b) (1) (A) of the Act condemns the infringement of these rights and Section 10 of the Act provides an administrative remedy, with ultimate resort to the courts, in event of alleged infringement.

The Act thus protects the rights of employees to work during a strike against coercion by any means, including actual or threatened violence, and provides a remedy for the enforcement of this right. It does not protect the right of an employer to engage in his business or occupation against similar infringement and provides no remedy to an employer which he may pursue in the event the operation of his business is interfered with in parallel instances.

True, an employer may file a charge that an unfair labor practice has been committed and thereby put in motion the investigative machinery of the Board, but in so doing, a charge of violation of Section 8 (b) (1) (A), by whomever filed, will put in motion only machinery designed to protect and vindicate the rights of employees. No machinery designed to protect the parallel rights of the employer is provided by the Act.

In the decision of the *Laburnum* case, this Court emphasized that its decision applied only to an employer who had no remedy before the National Labor Relations Board, saying:

> "To the extent that Congress prescribed preventive procedure against unfair labor practices, that case recognized that the Act excluded conflicting state procedure to the same end. To the extent, however, that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penal-

ties or liabilities for tortious conduct have been eliminated" (347 U. S. 656, 665).

Again emphasizing that it did not intend that the *Laburnum* decision should apply to any case in which an administrative remedy was provided by the Federal Act, in *Webe. v. Anheuser-Busch, Inc.*, 348 U. S. 468, the Court twice distinguished the *Laburnum* case, saying:

> "Finally, *United Construction Workers v. Laburnum Construction Corporation*, 347 U. S. 656, was an action for damages based on violent conduct which the state court found to be a common law tort. While assuming that an unfair labor practice under the Taft-Hartley Act was involved, this Court sustained the state judgment on the theory that there was no compensatory relief under the federal Act and no federal administrative relief with which the state remedy conflicted (348 U. S. 468, 477).
>
> "• • •
>
> Our approach was emphasized in *United Construction Workers v. Laburnum Construction Corporation, supra*, where the violent conduct was reached by a remedy having no parallel in, and not in conflict with, any remedy afforded by the federal Act"[17] (348 U. S. 468, 480).

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[17] Our construction of the ruling of the Court in the *Laburnum* case is buttressed by the holding of the Ninth Circuit on rehearing in the case of *Born v. Laube*, and of the Supreme Court of the State of Washington in *Mahoney v. Sailor's Union of the Pacific.*

"We have carefully considered the Laburnum decision and are of opinion that it is distinguishable inasmuch as the complaining party there, under the Labor Management Act, was wholly without remedy in damages for the tortious conduct of the Union. Here the complaining employee had available the remedy of reinstatement with back pay." (*Born v. Laube*, 214 F. 2d 349 (C. A. 9), cert. den. 348 U. S. 855.)

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If the right of an employer to conduct his business and to own property free from interference or damage by violence had been guaranteed by the National Labor Relations Act, and if the Labor Board had been charged with the responsibility of protecting these rights, Laburnum undoubtedly would have been decided differently by the Court. *Garner v. Teamsters Union*, 346 U. S. 485.

It is also probable that the Court would have reached a different conclusion in the *Laburnum* case had the union conduct in the case involved border line activity raising questions of national policy as to whether the activity was protected and privileged, rather than extreme violence which has been repeatedly and clearly held, both by the courts and the Board, to be unprotected and illegal. *Laburnum* presented an actual armed invasion by superior inimical forces to compel the exclusive employment of persons who were not then standing in the relationship of employees to the employer. The instant case involves at most a voluntary mass demonstration to show support of a Federally protected strike by employees seeking a contract with their employer.

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"*United Construction Workers v. Laburnum Construction Corporation*, 347 U. S. 656, 74 S. Ct. 833, relied upon by respondent, does not announce a different rule. In this case the state court was held to have jurisdiction, because the act does not provide a procedure under which the plaintiff in that action could have obtained the compensatory relief which he sought—damages for loss of profits due to interference with the performance of the plaintiff's contracts." *Mahoney v. Sailor's Union of the Pacific*, 45 W. 2d 453, 275 Pac. 2d 440, 445, cert. den. 349 U. S. 915.

See also: *McNish v. American Brass Co.*, 139 Conn. 44, 89 Atl. 2d 566, cert. den. 344 U. S. 913.

Sterling v. Local 438, Liberty Assn. of Steam and Power Pipefitters and Helpers Assn., 207 Md. 132, 113 Atl. 2d 389, cert. den. 350 U. S. 875.

The *Laburnum* decision in the light of the other pronouncements of the Court, demarks clearly the distinction between actions by an employee upon subject matter covered by Sections 7, 8 (b)(1)(A) and 8(b)(2), and actions by an employer, whose parallel rights are unprotected.

F. ASSUMING THAT THE EXTENT OF RELIEF PROVIDED BY CONGRESS IS A RELEVANT CONSIDERATION, IT WOULD APPEAR THAT THE POWER OF THE NATIONAL LABOR RELATIONS BOARD TO ENTER REMEDIAL AND REPARATION ORDERS IS COEXTENSIVE WITH ITS DISCRETION TO ACCORD SUCH RELIEF AS WILL EFFECTUATE THE POLICIES OF THE ACT.

While the National Labor Relations Board has often held that it is a violation of Section 8 (b)(1)(A) of the Act for a labor organization or its agents to interfere by mass picketing, violence, or threats of violence, with the right of an employee to work during a strike, it has held that it is without power or jurisdiction to enter an award of back pay where the wages lost by the employee were as the result of an interference with his right of ingress to his place of employment, as was contended in the instant case. *Colonial Hardwood Flooring Company, Inc.*, 84 N. L. R. B. 595; *United Mine Workers of America and West Kentucky Coal Co.*, 92 N. L. R. B. 916. This legal conclusion of the National Labor Relations Board, which has never received judicial sanction by direct review,[18] was

[18] Since this determination of the extent of the Board's jurisdiction and remedial power involves a question of law, rather than an exercise of administrative discretion, the interpretation placed upon the Act is open to review by the Court without any presumption in aid of its validity.

The Board is duty bound by law to find correctly and to recognize the full extent of the jurisdiction vested in it by the Statute, even though it may have a discretion as to the manner and extent of its exercise. If the

(Continued on next page)

relied upon by the Supreme Court of Alabama in its original decision upon the question of Federal preemption in the instant case.

This construction of the Act by the National Labor Relations Board and by the Supreme Court of Alabama is in apparent conflict with the decisions of this Court in *Phelps-Dodge Corporation v. N. L. R. B.*, 313 U. S. 177, and *Virginia Electric and Power Co. v. N. L. R. B.*, 319 U. S. 533. In the former case the Court said:

> "To differentiate between discrimination in denying employment and in terminating it, would be a differentiation not only without substance but in defiance of that against which the prohibition of discrimination is directed.
>
> "But, we are told, this is precisely the differentiation Congress has made. It has done so, the argument runs, by not directing the Board 'to take such affirmative action as will effectuate the policies of this Act', *simpliciter*, but, instead, by empowering the Board 'to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.' To attribute such a function to the

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(Continued from preceding page)

law reposes discretionary authority in the Board, the Board is obligated by statute to exercise the discretion and cannot abandon this power and duty through the means of a legal construction limiting its remedial authority. *Office Employees International Union v. N. L. R. B.*, #422, May 6, 1957, — U. S. —, 77 S. Ct. 799.

In an analogous situation, where the Federal Power Commission had long disclaimed jurisdiction to establish rates on the sale of natural gas within the state of production, the Court noted that sales to interstate pipe lines had a direct and substantial effect on rates paid by ultimate consumers in other states, and that the Commission was bound to exercise its *statutory* jurisdiction irrespective of administrative difficulties, saying that "exceptions to a primary grant of jurisdiction * * * are to be strictly construed." *Phillips Petroleum Company v. Wisconsin*, 347 U. S. 672, 679.

> participial phrase introduced by 'including' is to shrivel a versatile principle to an illustrative application. We find no justification whatever for attributing to Congress such a casuistic withdrawal of the authority, which but for the illustration, it clearly has given the Board. The word 'including' does not lend itself to such significance" (313 U. S. 177, 188-9).

And in the latter case the Court said:

> "The declared policy of the Act in Section 1 is to prevent, by encouraging and protecting collective bargaining and full freedom of association for workers, the costly dislocation and interruption of the flow of commerce caused by unnecessary industrial strife and unrest. See *Labor Board v. Jones and Laughlin*, 301 U. S. 1. Within this limit the Board has wide discretion in ordering affirmative action; its power is not limited to the illustrative example of one type of permissible affirmative order, namely, reinstatement with or without back pay. *Phelps-Dodge Corp. v. Labor Board*, 313 U. S. 177, 187-89. The particular means by which the effects of unfair labor practices are to be expunged are matters 'for the Board not the court to determine.' *I. A. of M. v. Labor Board, supra*, at page 83; *Labor Board v. Link-Belt Co., supra*, at page 600. Here the Board in the exercise of its informed discretion, has expressly determined that reinbursement in full of the check-off dues is necessary to effectuate the policies of the Act" (319 U. S. 533, 539).

The decision of the Board in *Colonial Hardwood Flooring Co., Inc.*, 84 N. L. R. B. 563, 565, upon which the Board relied for its decision in the *United Mineworkers of America* decision (92 N. L. R. B. 916) is in direct opposition to these quotations from the decision of this Court. In the *Colonial Hardwood Flooring* case the Board adopted and

followed exactly the reasoning which was repudiated by this Court in the *Phelps Dodge Corp.* decision. The Board attributed to the illustrative phrase in Section 10 (c) of the amended Act: "Provided, that back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him," an intent of Congress to limit the power of the Board. Clearly this proviso illustrates the type of order which might be found appropriate in cases specifically involving discrimination and tenure of terms of the employment relationship between the employee and his employer, and is in no manner a limitation upon the general power of the Board "to take such affirmative action as will effectuate the policies of the Act."

In the *United Mineworkers* case, Member Reynolds, who had joined in the *Colonial Hardwood* decision, dissented and repudiated his previous opinion, stating that the only way in which the unfair labor practice—preventing an employee from working during a strike—could be remedied was by requiring the responsible union to make him whole for lost pay. Member Reynolds' dissent discusses fully the pertinent decisions of this Court and the entire legislative history of amended Section 10 (c) and is reprinted in full in Appendix "D." The legislative history, therefore, is not set forth more fully here.

In Section 1 (b) of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C. 141 (b)), Congress made the following declaration of policy:

> "It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, *to protect the rights*

> *of individual employees in their relations with labor organizations whose activities affect commerce,* to define and prescribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce." (Emphasis supplied.)

This expression of policy to protect the rights of individual employees is emphasized by the legislative history of Section 10 (c), especially in House Report 245, on H. R. 3020 (80th Congress, First Session), page 42. The House Report, in commenting upon the House Bill which provided only that the Labor Board should take such affirmative action as would effectuate the policies of the Act, said:

> "This Section, dealing with remedies the Board may prescribe contains these three significant changes.
>
> "A. One, in language like that which is applicable to employers who violate Section 8 (a) authorizes the Board to order unions and their adherents who violate Section 8 (b) to cease and desist from unfair labor practices and to take such affirmative action as will effectuate the policies of the Act * * *. Under this clause the Board may also require a union to reimburse an employee whom it causes to lose pay the amount that he loses."
>
> *Cf., Senate Report 105 on S. 1126* (80th Congress First Session), p. 26.

The basic remedial power granted to the Board in Section 10 (c) of the amended Act (29 U. S. C. 160(c)) states:

> "if * * * the Board shall be of the opinion that any person named in the complaint has engaged

in, or is engaging in any such unfair labor prac
tice, then the Board shall state its findings of fac
and shall issue and cause to be served on such per
son an order requiring such person to cease and de
sist from such unfair labor practice, *and to tak
such affirmative action* including reinstatement o
employees with or without back pay, *as will effect
ate the policies of this Act.*" (Emphasis supplied.

These italicized powers are identical to those containe
in the House amendment which the House explained a
giving power to make back pay orders against union
When this basic power is construed in the light of the pr
vious decisions of this Court, which hold that the word
"including reinstatement of employees with or withou
back pay" are illustrative only, it is difficult not to con
clude that the previous power in the Board to enter suc
remedial and reparation orders as would effectuate th
policies of the Act was not diminished by the amende
Act but was, in fact, extended so as to authorize bac
pay orders against unions as well as against employer

Section 8 (a) (1) of the Act is the counterpart of Sec
tion 8 (b) (1) where employers, instead of unions, ar
charged with interference with the rights of employee
Similarly, Section 8 (a) (3) is the counterpart of Sectio
8(b) (2), for discrimination as to employment.

While holding in the *Colonial Hardwood* and *Unite
Mineworkers* cases that it cannot award back pay agains
a union under Section 8 (b) (1) without finding a violatio
of Section 8 (b) (2), yet the Board has held in at leas
one case that it *does* have the power to award back pa
against an employer for a violation of Section 8 (a) (1
although specifically finding that no 8 (a) (3) discrimina
tion by the employer was shown. *West Boylston Mfg. Co*
87 N. L. R. B. 808 (1949). Board Member Houston, d

rectly contrary to his opinion in the *Colonial Hardwood and United Mineworkers case*, said in concurring:

> "In any event, whether the Respondent's conduct be deemed violative of Section 8 (a) (3) as well as 8 (a) (1) and (5) or, as found by the majority, only of 8 (a) (1) and (5), I would direct back pay, as well as reinstatement, for the employees whose employment was terminated as a result of the Respondent's illegal unilateral adoption of the merit rating system. Section 10 (c) of the Act gives the Board broad powers to remedy unfair labor practices. The award of back pay is not limited by the Act to those cases in which the Board has found that Section 8 (a) (3) has been violated. As stated by the Supreme Court, '• • • in the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act • • •. The remedy of back pay is entrusted to the Board's discretion.' *Phelps Dodge Corporation v. N. L. R. B.*, 313 U. S. 177, 194, 198. The Supreme Court has also stated that 'The relief which the Statute empowers the Board to grant is to be adapted to the situation which calls for redress.' *N. L. R. B. v. Mackay Radio and Telegraph Co.*, 304 U. S. 333." 87 N. L. R. B. 808, 818.

The types of orders which the Board has found appropriate to effectuate the policies of the Act have been many and varied, for example: Back pay during period of illegal lockout (*Wood Mfg. Co.*, 95 N. L. R. B. 633 (1951)); back pay during illegal layoff (*Underwood Machinery Co.*, 95 N. L. R. B. 1386 (1951)); back pay for illegal denial of employment (*Pacific American Shipowner's Assn.*, 98 N. L. R. B. 583 (1952)); back pay after strike when offer to return to work is refused (*Nashville Corp.*, 84 N. L. R. B. 1567 (1951)); restoring employees to occupancy of homes

(*Williams Lumber Co.*, 96 N. L. R. B. 635 (1951)); award of stock bonus (*United Shoe Mach. Corp., Inc.*, 96 N. L. R. B. 1309 (1951)); moving expenses (*Rome Products Co.*, 77 N. L. R. B. 1217 (1948)); refund of union dues withheld from wages (*Virginia Electric and Power Co. v. N. L. R. B.*, 319 U. S. 532)); refund of dues obtained by union threats and coercion *in violation of Section 8 (b) (1) (A)* (*Eclipse Lumber Co., Inc.*, 95 N. L. R. B. 464 (1951)).

The Act does not expressly confer power upon the Board to enter any of the above orders. In every case the remedial power invested in the Board is the same—an order that the guilty party shall "take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." 29 U. S. C. 160 (c).[19]

From the foregoing, there appears to be little logical basis for assuming that the jurisdiction of the National Labor Relations Board is less exclusive where unfair labor practices under Section 8 (b) (1) are involved than where those defined by Section 8 (b) (2) are in issue, although the question has not been definitely adjudicated. It may well be, of course, that the Board's view on appropriate remedies under Section 8 (b) (1) (A) could be adopted as a matter of *discretionary policy;* but it is difficult to see why statutory *authority* or *jurisdiction* to award back

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[19] Section 10 (c) then goes on to state:

"Provided, that where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him."

This proviso does not limit the scope of remedial orders which the Board may issue but merely points out that a union may *cause* an employee to suffer discrimination, either directly or indirectly through an employer, and that the Board *may*, in its discretion, issue its back pay order only against the party responsible for such discrimination.

pay to a coerced employee is lacking. All criteria indicate that the exclusiveness of the Board's jurisdiction over unfair labor practices and employee rights protected by Section 7 is uniform, and that the remedial powers of the Board to redress violations of Section 7 rights is exclusive.

E. g.: *Born v. Laube,* 213 F. 2d 407 (C. A. 9) (reh'ng denied 214 F. 2d 349, cert. den. 348 U. S. 855); *McNish v. American Brass Co.,* 139 Conn. 44, 89 Atl. 2d 566 (cert. den. 344 U. S. 913); *Mahoney v. Sailor's Union of the Pacific,* 45 W. 2d 453, 275 Pac. 2d 440 (Cert. den. 349 U. S. 915); and *Sterling v. Local 438, Liberty Ass'n of Steam and Power Pipefitters and Helpers Ass'n,* 207 Md. 132, 113 Atl. 2d 389 (cert. den. 350 U. S. 875).

Each of these cases was a decision that courts are without jurisdiction to entertain a suit for damages against a labor organization, brought by an employee, to recover for union interference with employment on account of nonmembership in a labor organization, because the National Labor Relations Board has exclusive jurisdiction to redress the rights of the employee, and such rulings were each contrary to the conclusion reached by the Supreme Court of Alabama in the instant case.

In *Born v. Laube,* the Court of Appeals said:

> "It is argued that the Board, although having authority to require the offending union to reinstate and financially to make whole the victim of the unfair labor practice, is without power to assess punitive damages; consequently, the view should be taken that Congress did not intend to preclude the victim from enforcing this private right in an action at common law. However, we think it evident that since the Act provides a procedure for redress and a corresponding remedy, both the procedure and the remedy are exclusive in the absence

> of an express provision or Board delegation to the contrary. As said in *Nathanson v. N. L. R. B.*, 344 U. S. 25, 27: 'A back pay order is a reparation order designed to vindicate the public policy of the statute by making the employees whole for losses suffered on account of an unfair labor practice (citation). Congress has made the Board the only party entitled to enforce the Act.' A remark of Justice Holmes in *Charleston & Western Carolina Railway Co. v. Varnville Furniture Company*, 237 U. S. 597, 604, though dealing with an unrelated subject, is pertinent here. 'When Congress,' he said, 'has taken the particular subject-matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go." (213 F. 2d 407, 410).

In *McNish v. American Brass Company*, 139 Conn. 44, 98 Atl. 2d 566, the Connecticut court pointed out that in those fields in which it was intended that the federal legislation should be operative the regulations enacted into law by Congress are exclusive and that one of the phases of labor relations affecting interstate commerce which the National Labor Relations Act does purport to cover is the matter of union unfair labor practices. The decision is, in part, as follows:

> "In enacting the National Labor Relations Act of 1935, 49 Stat. 449, 29 U. S. C. §151, (1940), and the Labor Management Relations Act, 1947, known as the Taft-Hartley Act, 61 Stat. 136, 29 U. S. C. §141 (Supp. 4, 1951), Congress sought to reach only some of the aspects of the employer-employee relationship. *Bethlehem Steel Co. v. New York Labor Relations Board*, 330 U. S. 767, 773, 67 S. Ct. 1026, 91 L. ed. 1234. In those fields in which it was intended that the legislation should be operative, the regulations enacted into law by Congress

are exclusive. *Amalgamated Assn. of Employees v. Wisconsin Board*, 340 U. S. 383, 389, 71 S. Ct. 359, 95 L. ed. 364; *International Union v. O'Brien*, 339 U. S. 454, 457, 70 S. Ct. 781, 94 L. ed. 978; *La Crosse Telephone Corporation v. Wisconsin Board*, 336 U. S. 18, 24, 69 S. Ct. 379, 93 L. ed. 463; *Bethlehem Steel Co. v. New York Labor Relations Board, supra; Norris Grain Co. v. Seafarers' International Union*, 232 Minn. 91, 99, 46 N. W. 2d 94, 100; *Pittsburg Rys. Co. Employees'* Case, 357 Pa. 379, 382, 54 A. 2d 891. The confusion which would result from dual control is graphically described in the *Bethlehem Steel Co. case, supra* 775.

"One of the phases of this relationship which the National Labor Relations Acts do purport to cover is the matter of unfair labor practices • • •.

"The actions of the defendants set forth in the second count of the complaint in the case at bar constitute unfair labor practices under the Act. The plaintiff's remedy, therefore, lies within the exclusive jurisdiction of the National Labor Relations Board."

In the *Sterling* case (207 Md. 132, 113 Atl. 2d 389, 396), the Maryland court stated:

"Here the very rights of a worker which Congress afforded protection by the National Labor Relations Board are sought by appellant to be protected by the courts of Maryland. Congress has provided the exact type of remedy which the state could afford, that is, the Board is empowered not only to require the union to cease its unlawful activity and discrimination, but to pay the injured worker the same amount and type of compensatory damages he could recover in the state court. No question of the police power of the state is involved. *It is no answer to say, as the appellant does, that the statute of limitation under the Taft-Hartley Act is six months, whereas in the state court it is*

three years, or that he cannot recover punitive damages before the Board. The appellant himself has waited several years without seeking any relief from the Board. He should have applied to it as soon as his rights were affronted, and he cannot pull himself up by his boot straps by waiting several years and claiming inadequacy of remedy because of lapse of time." (Emphasis added.)

We conclude that among the various forms of relief which the Board may formulate is the award of back pay due because of interference with employment. Congress has "prescribed (this) procedure for dealing with the consequences of (this) tortious conduct already committed." *United Construction Workers v. Laburnum Corporation*, 347 U. S. 656, 665. (Words in parenthesis supplied.)

G. THE PROTECTION OF THE RIGHT TO ENGAGE IN CONCERTED CONDUCT AND THE INTERBALANCING OF THIS RIGHT WITH THE RIGHT OF EMPLOYEES TO WORK IN THE FACE OF A STRIKE CANNOT BE ACCOMPLISHED BY A MULTIPLICITY OF PROCEDURES AND TRIBUNALS. IT WAS THE AIM OF CONGRESS TO ENTRUST THESE MATTERS TO THE NATIONAL LABOR RELATIONS BOARD WHERE THEY COULD BE REGULATED BY A SINGLE HARMONIOUS PATTERN OF RULES ADMINISTERED BY AN EXPERT AGENCY AND WHERE THEIR INTEGRITY COULD BE UNIFORMLY INSURED.

As we have already shown, the Court has uniformly held that within the realm of the subject matter entrusted to the National Labor Relations Board, the jurisdiction granted to the Board by Congress was intended to be exclusive, and that Congress intended to dispel the confusion which would result from a dispersion of authority and from multiplicity of regulation (*Garner v. Teamsters*

Union, 346 U. S. 384; *Amalgamated Association of Street, Electric Railway, etc., Employees v. Wisconsin Employment Relations Board*, 340 U. S. 383.

In *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U. S. 261, 264, the Court said:

> "To attain its object Congress created a particular agency, the National Labor Relations Board, and established a special procedure. The aim, character and scope of that special procedure are determinative of the question now before us. Within the range of its constitutional power, Congress was entitled to determine what remedy it would provide, the way that remedy should be sought, the extent to which it should be afforded, and the means by which it should be made effective.
>
> "Congress declared that certain labor practices should be unfair, but it prescribed a particular method by which such practices should be ascertained and prevented. By the express terms of the Act, the Board was made the exclusive agency for that purpose."[20]

In so doing Congress had a "general intent to preempt the field" and "expressed its judgment in favor of uniformity." *Guss v. Utah Labor Relations Board*, 353 U. S. 1.

The right of employees to organize and to strike is a fundamental right. *National Labor Relations Board v. Jones and Laughlin Steel Corp.*, 301 U. S. 1, 33. Not only

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[20] The deletion from Section 10 (a) of the amended Act of the word "exclusive" was not intended to vest courts with general jurisdiction over unfair labor practices, but merely to recognize the special jurisdiction vested in courts by Section 10, Sub-Sections (j) and (l), and Sections 301 and 303 of the Act. *Amazon Cotton Mill Co. v. Textile Workers Union of America*, 167 F. 2d 183 (CA-4); *Guss v. Utah Labor Relations Board*, 353 U. S. 1.

is the right fundamental, but it is a right guaranteed to employees by Section 7 of the National Labor Relations Act. *Amalgamated Association of Street, Electric Railway, etc. Employees v. Wisconsin Employment Relations Board*, 340 U. S. 383, 390. The existence of a guaranteed right to engage in a lawful strike carries with it the necessary correlative guarantee that such right may be exercised free of liability in damages for economic loss proximately caused thereby to others.[21]

This right may be lost to employees just as well by subjecting their legal representatives and union to liability in damages under a multiplicity of procedures because of aid rendered to the employees as by subjecting the employees themselves to liability. To regulate the collective bargaining representative is to regulate the freedom of employees to exercise the rights guaranteed to them by Congress in Section 7. *Hill v. Florida*, 325 U. S. 538.

There was no question in this case but that the Respondent lost five weeks time from his work during a *lawful* strike, and that he incurred a consequent loss of wages. The principal factual issue was whether this loss of wages was the proximate result of the strike, which was lawful, protected activity and consequently was privileged, or was the proximate result of alleged excessive picketing in support of the strike. The Petitioners contended that the employer was caused to close its plant because so many of its employees voluntarily participated in the strike that

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[21] This right is expressed in *Restatement of Torts*, §809, as follows:

"When concerted action by workers against another causes economic loss to a third person through the effect of the action on the other, the workers are not liable for such loss if their action was not directed against the third person and is privileged as to the other against whom it was directed."

Restatement of Torts, §775, states the rule that a strike for lawful objects is protected and privileged conduct.

it would have been impossible to operate. The Petitioners further contended below that here was no showing that any work would have been available to Respondent if he had entered his place of employment, and that consequently he suffered no loss of wages as a result of excessive picketing.

Every legal Federally protected strike has as its basic purpose and objective the bringing of economic pressure to bear upon the employer and this objective, if successful, causes the operations of the employer to be suspended and incidentally causes a loss of work to employees who may wish to work. This incidental damage results from privileged conduct, however, and gives rise to no cause of action to the employees losing wages. Upholding the Federal policy of protecting legal strikes should require the person complaining of economic loss from improper conduct during a Federally privileged strike to carry a burden of proof which would convincingly demonstrate that the loss was not the result of privileged conduct.

The trial judge recognized the privileged nature of the strike and felt obligated to, and did, charge the jury upon the rights accruing to Petitioners under the National Labor Relations Act (R. 624-626, 639-641).

He also charged the jury that it would have to find that work would have been available to Respondent, notwithstanding excessive picketing, and that the loss of work resulted from no other cause, before the Respondent would be entitled to recover.[22]

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[22] These charges were as follows.

"I charge you that unless you are reasonably satisfied from the evidence in this case that the proximate cause of plaintiff's inability to work at the Decatur plant of Calumet and Hecla Consolidated

(Continued on next page)

Thereby Federal rights, entrusted by Congress to the National Labor Relations Board, were placed into the hands of a state court jury for interpretation and protection. Furthermore, in their very expression the rights

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(Continued from preceding page)

Copper Company (Wolverine Tube Division) during the period from July 18, 1951 to August 22, 1951, was that a picket line was conducted by the defendants in a manner which by force and violence, or threats of force and violence prevented the plaintiff from entering the plant, and unless you are also reasonably satisfied from the evidence that work would have been available to the plaintiff in the plant during said period, except for picketing in such manner, you should not return a verdict for the plaintiff" (R. 639).

"I charge you that if you are reasonably satisfied that the plant of Calumet and Hecla Consolidated Copper Company (Wolverine Tube Division) was closed by its management to work by hourly paid employees during the period from July 18, 1951 to August 22, 1951, for any cause other than the manner in which picketing was conducted by defendants, the acts complained of by the plaintiff, if said acts occurred, would not be the natural and proximate cause of any loss of wages to the plaintiff" (R. 641).

The following charge was requested but refused:

"I charge you that employees have the right to join trade, or labor unions and to organize themselves, in order to better their terms and conditions of employment, the right to select for themselves a representative, such as a labor union, to deal for them with their employer, the right to strike for legitimate and lawful objects, and the right to picket peacefully in furtherance of their strike and to persuade peaceably others to join them in their endeavor. Where a strike of employees is directed against their employer in an effort to obtain legitimate and lawful objects, they are not liable to their employer for economic loss sustained as a result of peaceful picketing in furtherance of said strike. Neither are the employees liable to their fellow employees for wages lost because of a strike, unless it is shown that the strike was unlawfully directed against the fellow employees, or unless it is shown that the loss of wages was proximately caused by unlawful conduct in furtherance of the strike. It is not contended by the plaintiff in this case that the strike was unlawfully directed against the plaintiff" (R. 641)..

Although this charge was refused, the Court charged the same general subject-matter in his oral charge to the jury, and the refusal, therefore, probably was not reversible error (R. 624-626).

were buried beneath the cumbersome and technical language required by common law procedure, and were confused by the giving of Respondent's requested Charge #9, which erroneously authorized the jury to return a verdict upon a bare finding that he was unable to enter his place of employment, irrespective of whether work would have been available during the strike (See footnote 8, p. 14, *supra*).

The jury returned a verdict for Respondent in the amount of $10,000 (R. 12), which necessarily means that in excess of $9,500 of the verdict was a regulatory or punitive award, because he was not damaged in his person or property, and the greatest actual damage he could have sustained was the loss of approximately $450 for wages during the period of the strike.

There was no evidence that work would have been available to Respondent had he reported to his work on the morning the strike began. We earnestly believe that the evidence demanded a conclusion that so many employees were voluntarily supporting the strike at its inception that the employer could not have operated its plant and that the employer, knowing this, decided, before the picket line was established, not to attempt to operate.[23]

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[23] The Supreme Court of Alabama in upholding the verdict, did not explain what evidence was introduced by the plaintiff which would justify a verdict for him and the only finding it made, with reference to the evidence as to the cause of the plant closing, was the statement that the Industrial and Public Relations Director for the plant denied telling Union officials at a pre-strike meeting that the plant would be closed to hourly rated employees during the strike (R. 655-656). The only way in which the Supreme Court of Alabama could have reached its conclusion was to indulge in an inference, from the fact that plaintiff appeared at the plant gate to enter his place of employment on the morning the strike began and was unable to do so, that had he entered his place of employment he would have been afforded work. There is no testimony or evidence in the record on which such a finding could be based and the Supreme Court of Alabama specifically failed to make such a finding.

We do not know what conclusions the National Labo
Relations Board would have drawn from the facts; bu
we do not believe it would have found a loss of work re
sulting from the picketing or that it would have foun
that the right to engage in a lawful and Federally pro
tected strike, free from liability in damages, had bee
waived by the demonstration of support and normal ex
huberance of strikers revealed by the evidence in this cas
N. L. R. B. v. Elkland Leather Co., 114 F. 2d 221 (C. A
3, 1940); *N. L. R. B. Remington-Rand*, 94 F. 2d 862 (C
A. 2, 1938); *Milkwagon Drivers Union v. Meadowmoo
Dairies, Inc.*, 312 U. S. 287.

We do know, however, that these are considerations o
national policy entrusted by Congress to the National
Labor Relations Board and that "Congress did not leav
it to state labor agencies, to state courts or to this Cou
to decide how inconsistent with federal policy state la
must be." *Amalgamated Meatcutters v. Fairlawn Meat
Inc.*, 353 U. S. 20, —.

If there is a federally protected right to strike, suc
right cannot exist where it is to be subjected to regulatio
by the opinions and prejudices of jurors in the thousand
of state trial courts throughout the nation. Similarly,
there is a right to refrain from striking—that is, to wor
in the face of a strike—such right cannot be uniformly
protected by the state trial courts.

These are not rights uniformly recognized by the more
of every community in the nation, as are questions o
criminal law and negligence. In one section of the coun
try the predominant public opinion is overwhelmingly i
favor of the striking employee and his rights. In such
community an employee, whose right to work during
strike has been interfered with, cannot be protected b

jurors who believe that a "scab" is the equivalent of a traitor to his nation, his fellowman and to himself.

In other communities the available jurors know little, if anything, of the trials and pressures which confront the industrial worker in his struggle for existence, and have no sympathy or understanding for the lot of industrial employees who concertedly withdraw their services from their employer. In these communities it cannot be expected that a trial jury, who believe all union adherents to be communists, can follow with discernment the niceties of factual causation in the question of whether a strike or a picket line was the proximate cause of a loss of wages to an employee.

Thus, the integrity of the right to strike and the interbalancing of this right with the right to work in the face of a strike are matters which can only be protected and fairly regulated through the dispassionate investigation of an impartial and expert agency established for this precise purpose.

If these rights cannot be expected to receive uniform protection as a result of multiplicity of tribunals and diversity of procedures before the state and federal courts of equity (*Garner v. Teamsters Union*, 346 U. S. 485; *Amazon Cotton Mill Co. v. Textile Workers Union of America*, 167 F. 2d 183), then it could not be hoped that the rights would receive any semblance of general equality if subjected to thousands of varying interpretations by a myriad of state trial courts and juries.

The very basis of the policy of the National Labor Relations Act is that employees shall be free to engage in concerted activities free from financial responsibility. To hold unions financially liable because of their having rendered aid to employees in the exercise of their lawful

protected rights is to strike at the very basis of freedom of association and of collective bargaining. The collective bargaining process and the administration of contractual rights of employees is dependent upon the financial integrity of unions. No weapon is more effective to disrupt and block the policy of free collective bargaining expressed by Congress in its labor relations statutes than the power to bankrupt the representatives of employees, especially local unions, under a thousand different authorities and rules varying from those of the National Labor Relations Board which Congress intended should be exclusive.

The power to impose staggering punitive damages upon labor activity in interstate commerce is the power to prohibit. Punitive damages in Alabama, as in most states, are awarded, not as a matter of private right, but in the interest of the state, as punishment to deter the wrongdoer and others from similar acts. The trial court so charged the jury in this case (R. 631-634, 636-637), as is authorized by the law of the state. E. g. *Meighan v. Birmingham Terminal*, 165 Ala. 591, 51 So. 775, 777, where the court said:

> "Such damages (exemplary) are assessed in proper cases in the interest of the state. They are awarded not for the compensation of the plaintiff, but as a warning to other wrongdoers."

The state, under the guise of the police power, therefore, can delegate to its juries the authority to determine what labor activity in interstate commerce is in the public interest and to regulate the area within which concerted activity is permissible and the manner in which it can be exercised. Such is exactly what the State of Alabama is doing in this case.[24]

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[24] See footnote 3, page 5, *supra*, and Appendix "B".

The rising flood of damage suit litigation of this character which labor unions are being required to defend is as effective in thwarting the national policy and in invading the authority delegated to the National Labor Relations Board as would be direct conflicting and prohibitory legislation.

This is not to say that violent picketing, threatening of employees, obstructing streets and highway, and picketing of homes are matters which the state may not prohibit in the exercise of its police power in an emergency. A state court of equity, under the rules established by this Court in *Milkwagon Drivers Union v. Meadowmoor Dairies*, 312 U. S. 287, 296, can prohibit excessive conduct which breaches the public peace and order without reaching into the field of interbalancing the exercise of rights protected by Section 7, which field was placed by Congress into the hands of the Board.

The problem of filtering from the facts the answer to questions of such complexity, that is whether or not the bounds of protected activity have been exceeded, and if so, have they caused financial loss to employees, can best be left to the skilled and professional discernment of the National Labor Relations Board in its development of substantive rules of permissible and prohibited conduct in labor controversies.

> "In numberless instances, the law warrants the intentional infliction of temporal damage because it regards it as justified. It is on the question of what shall amount to justification and more especially, on the nature of the considerations which really determine or ought to determine the answer to that question, that judicial reasoning seems to me often to be inadequate. The true grounds of decision are considerations of policy and of social advantage, and it is vain to suppose that solutions

can be attained merely by logic and the general propositions of law which nobody disputes. Propositions as to public policy rarely are unanimously accepted, and still more rarely, if ever, are capable of unanswerable proof. They require a special training to enable anyone even to form an intelligent opinion about them." Holmes, J., dissenting in *Vegelahn v. Guntner*, 167 Mass. 92, 105-6, 44 N. E. 1077.

CONCLUSION

For the reasons stated, we urge that the Supreme Court should find that the court of the State of Alabama was without jurisdiction to entertain the suit of an employee to recover damages for alleged interference with his right to work during a lawful strike in an industry affecting interstate commerce, subject matter as to which jurisdiction has been granted by Congress to the National Labor Relations Board. The issues which were submitted to the jury under the charge of the court and the evidence in this case graphically demonstrate that the state court jury in this case was in fact adjudicating matters of Federal right regulated by the National Labor Relations Act, as amended. Congress' determination in favor of uniformity

cannot help but be thwarted if such an adjudication by state court juries is permissible.

Respectfully submitted,

HAROLD A. CRANEFIELD,
General Counsel,

KURT L. HANSLOWE,
Assistant General Counsel, International Union, United Automobile, Aircraft and Agricultural Workers of America, AFL-CIO,
8000 East Jefferson Avenue,
Detroit 14, Michigan.

Of Counsel:
THOMAS S. ADAIR,
J. R. GOLDTHWAITE, JR.,
1431 Candler Building,
Atlanta 3, Georgia;

SHERMAN B. POWELL,
Second Avenue and Grant Street,
Decatur, Alabama.